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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 441

H. E. BUTT GROCERY COMPANY ET AL,
Appellants,

VS

GEORGE H. SHEPPARD ET AL,
Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR REHEARING



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TO THE SUPREME COURT OF THE UNITED STATES:

H. E. Butt Grocery Company and Southwest Texas Grocery Corporation, Appellants in the above entitled and numbered cause, petition the Court to grant a rehearing on its order entered on October 14, 1940, dismissing the appeal herein, and in support thereof, respectfully show:

The chain store tax questions involved in this appeal, we think, have not heretofore been presented to this Court. The Court has dismissed the appeal for want of a substantial federal question and, in support of this order, has cited *Board of Tax Commissioners vs Jackson*, 283 U. S. 527; *Liggett Co. vs Lee*, 288 U. S. 517; *Fox vs Standard Oil Co.*, 294 U. S. 87; *Great A. & P. Tea Co. vs Grosjean*, 301 U. S. 412.

From the above order we assume that the Court has concluded that the federal questions presented herein have been decided in the cited cases contrary to the contentions of Appellants. Of this conclusion we respectfully ask a re-examination by the Court in the light of the record and the legal principles applicable thereto.

First, Appellants herein do not attack the Texas Chain Store Tax Statute because of any discrimination contained therein between chains and a separately owned and operated store. On the contrary, we recognize that such classification is reasonable and has been sustained by this Court. Appellants herein assert that the Texas Act, as construed by the State Court in this cause and as applied to the particular situation of these two Appellants, results in an arbitrary discrimination between corporate chains. The question here presented was not involved in either of the cases cited in the per curiam opinion dismissing the appeal; and Appellants' position is not, we believe, overruled, but supported by the cases so cited.

Appellants are two independent corporations each operating more than one retail store. The State Court has held that the two chains are made one by the single

fact that the same individual owns a majority of the stock in Appellant corporations. Under this construction of the Act, each of Appellant corporations, solely because of the ownership of its corporate stock, is required to pay a far more burdensome occupation tax than other corporations which enjoy the same advantages, operate the same number of stores and sell the same kinds of merchandise. Under the construction, the classification of Appellant corporations for occupation tax purposes is based on corporate stock ownership and can be entirely changed by a simple transfer of stock certificates.

We call the Court's attention to the fact that, in each of the four above cited cases, chain store tax statutes were sustained because the classifications therein contained had a reasonable relationship to advantages enjoyed; and, in *Liggett Co. vs Lee*, 288 U. S. 517, that portion of the Florida Act was stricken which carried a classification unrelated to advantages or privileges. Further, in *Board of Tax Commissioners vs Jackson*, 283 U. S. 527, 542, the Court specifically emphasized that the difference supporting the classifications contained in the Act was not "solely one of ownership." It was there stated that the differences "consist not merely in ownership, but in organization, management, and type of business transacted." In the instant case, the classification of Appellant corporations is determined by the stock ownership in such corporations, which classification, we respectfully urge, is not supported by the above cited decisions of this Court or by any differences reasonably related to advantages and privileges enjoyed or to the differences upon which chain store tax statutes have been upheld.

In addition to the above, we direct the Court's attention to the first two propositions presented in Appellants' Statement as to Jurisdiction of the Court under which the Texas Act, as construed and applied, is attacked under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. These propositions, we believe, cannot be governed by the cases cited in the Court's order dismissing this appeal. Those cases were decided primarily, if not entirely, under the equality clause of the Fourteenth Amendment; while Appellants, in their first two propositions, assert the denial of due process without mention of the equal protection clause. Concerning these clauses of the Federal Constitution, this Court has long held that "the spheres of the protection they offer are not coterminous." (*Truax vs Corrigan*, 257 U. S. 312, 332.)

Appellants have attacked the statute as construed by the State Court in this case as denying due process because (1) the penal tax statute, as construed in this cause, creates a new offense but is so vague and indefinite that it fails to inform Appellants what conduct is either required or forbidden; (2) the Act, as construed, subjects Appellants to an occupation tax but delegates to the majority stockholder in Appellant corporations the legislative power to determine the amount of the total tax which shall be contributed by each of the taxpayers.

In Appellants' Statement, these propositions, with supporting authority, are set out in greater detail. They will not be re-argued here; but Appellants again emphasize that the attacks made thereunder do not involve equal protection of the laws. Irrespective of whether the classification is consonant with the

equality clause, we urge that the legislation falls short of due process even if every taxpayer within the State were affected by the Act in the same way as Appellants. We respectfully submit that such federal questions are substantial and that they cannot be foreclosed by the cited cases which arose and were decided under the equality clause.

WHEREFORE, Appellants pray that this Petition for Rehearing be granted and that the order entered on October fourteenth dismissing the appeal herein be set aside and upon final hearing that the judgment entered on February 7, 1940, by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, be reversed.

Respectfully submitted,

DAN MOODY,
Attorney for Appellants.

I, Dan Moody, an attorney of record in the above case, do hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

To certify which, witness my hand this the 25th day of October, 1940.

Attorney for Appellants.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Petition for Rehearing is acknowledged, this the.....day of October, 1940.

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Attorneys for Appellees.